(2)

No. 90-587

In The

Supreme Court of the United States

October Term, 1990

THE CONE CORPORATION, et al.,

Petitioners,

v.

HILLSBOROUGH COUNTY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. a. Has a county demonstrated a "compelling interest" sufficient to implement a race-conscious program in local construction contracts when, after six years of experience with a voluntary race-neutral program, it finds

   i. Continuing gross disparities between the availability of local minority and female contractors and the amount of public contract and sub-contact work reaching them;

   ii. Agency complaints of race and sex discrimination by local contractors in awarding subcontracts, and fraud in connection with federal programs; and

   iii. A high volume of citizen complaints of race and sex discrimination by local contractors, with many such complaints being documented by county investigators?

   b. Is "strict judicial scrutiny" properly applied, as required by *City of Richmond v. J. A. Croson Company*, 488 U.S. ___, 102 L.Ed.2d 854 (1989), when a court permits a county to implement a race-conscious program based on such evidence?

2. Have petitioners demonstrated, or does the record otherwise show, that the object of Hillsborough County's minority business enterprise law is to rectify a statistical disparity rather than, as it states and the Court of Appeals found, to eliminate existing race and sex discrimination in the local construction industry?

3. Does *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L.Ed.2d 733 (1989) have any bearing on a local government's demonstration of need for race-conscious measures, when it relies on the evidence cited in question 1 above?

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Does *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. ___, 111 L.Ed.2d 445 (1990) have any bearing on the evaluation of a state or local race-conscious program, and did the Court of Appeals *sub silentio* rely on it in finding that Hillsborough County had made an adequate showing of need?

5. Have Petitioners demonstrated, or does the record otherwise show, that Hillsborough County failed to consider and implement race-neutral measures before resorting to a race-conscious program?

6. Does this record present any issue regarding the continuing need for a race-conscious program in Hillsborough County, when such issue was not referred to by the Court of Appeals or presented by the parties?

LIST OF PARTIES AND INTERESTED PERSONS

Subsequent to the decision of the Court of Appeals, Larry J. Brown resigned as County Administrator of Hillsborough County and was succeeded in that office by Frederick B. Karl. A motion to substitute Mr. Karl for Mr. Brown as a respondent is being filed concurrently herewith. Except as stated above, the list of interested parties in the Petition for Certiorari identifies all parties known to Respondents.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATEMENT OF THE CASE

The parties agree that Hillsborough County, Florida has a long history of pervasive official and private discrimination, directed primarily against blacks but also against other minorities and women. The parties further agree that in the mid-1970's Hillsborough County began, under some prodding by federal agencies, to consider the effect of this discrimination on the local construction industry, whether it continued, and what to do about it. Beyond that point, however, which is reached after the first paragraph of petitioners' Statement of the Case, respondents disagree with virtually all of the rest, including petitioners' description of the evidence on the basis of which the Court of Appeals acted, the nature and history of the race-neutral program in effect in Hillsborough County from 1978 through 1984, the issues presented to and the holding of the Court of Appeals, and even the procedural history of the case. Respondents therefore submit the following Statement of the Case, in which petitioners' specific misstatements will be identified as they appear.

It will constitute sufficient discussion of Hillsborough County's legacy of discrimination to note that the County Courthouse, built in 1960, originally had separate "white" and "colored" rest rooms and water fountains, and that it was not until 1976 that Hillsborough County officially adopted a policy of non-discrimination in governmental action. (R. 4, Gilder, pp. 9-10; Plft. Ex. 23). Before this policy was adopted Hillsborough County knew nothing about the nature and condition of minority

business, or the extent to which public contract and procurement expenditures were reaching the minority business community, except that there was a general sense that minorities, and particularly blacks, were not doing business with the County or on County contracts. (R. 4, Gilder, pp. 8-9, 22). The policy was simply a statement of purpose.

Between 1976 and 1978 Hillsborough County began to receive evidence confirming the impression that blacks and other minorities were shut out of County business. Among others, the Environmental Protection Agency warned the County in 1977 that discrimination existed in federally funded local projects and that to comply with its obligation as a grantee it must take affirmative steps to insure contractor compliance with minority participation requirements. What statistics the County had regarding minority and female participation in County business, though sketchy, indicated that blacks were getting virtually none, and Hispanics and women were significantly under-represented. (Deft. Ex. 3, 13).

In 1978 Hillsborough County adopted a minority and female business enterprise program, which aimed to encourage and facilitate minority and female representation in public expenditures. It contained no affirmative race-conscious requirement, depending entirely on voluntary action by contracting agencies and general contractors. The program addressed many areas, including procurement and bidding policies, which were overhauled to facilitate bidding by small business concerns; outreach, education, and liaison programs to help minority businesses become knowledgeable about business

opportunities and bidding practices, and to increase contact between the white and minority business communities; and monitoring programs to find out what the extent of minority and female participation really was.[1] The program was administered by the Hillsborough County Equal Opportunity Office. (R. 3/10-12, 35-38, Deft. Ex. 18, 19, 32).

The record does not support, and in fact refutes, petitioners' statement that the 1978 program was "never funded, implemented, or enforced". (Petition at 3). Petitioners cite two exhibits, a 1981 memorandum to the County Administrator from Robert Saunders, Director of the Equal Opportunity Office, and a 1982 memorandum

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[1] The statement at page 3 of the Petition that a Labor Department study of the City of Tampa "found no discrimination which affected minority or female businesses in the construction industry" is, if literally true, grossly misleading. The study made no finding concerning discrimination; it simply surveyed the general condition of minority business in Tampa. It did not opine on whether minority businesses were being discriminated against by prime contractors or by the County. It did find, however, that minority businesses as a class suffered from a number of institutional disadvantages relative to white businesses, including lack of access to capital, more bonding difficulties, and the like. Significantly, it traced these current difficulties to past institutional and private discrimination. Before the 1964 Civil Rights Act the minority business community was limited to the minority population for custom. As a result, minority businesses adapted to the needs of their only customers, requiring that they be smaller companies specializing in smaller jobs, labor rather than capital-intensive. The Civil Rights Act released their captive market but left them unable to compete in the non-minority and public markets, because of the very characteristics they had developed to serve the minority market. (Deft. Ex. 11).

to Mr. Saunders from his deputy, Jacqueline Barr. Saunders' memorandum complained that his office was not being given sufficient "resources" to accomplish its objectives. The context discloses that he was referring to legislative, not financial, resources. He complained that in three years there had been no improvement in minority participation and urged that enforceable race-conscious participation goals be adopted. The 1982 memorandum discusses the evidence of four years regarding both contractor and County procurement performance. The statement (Petition at 22) that Ms. Barr concluded "that there is little or no effort to properly implement the existing policy for minority/female participation aggressively" was part of a criticism of County procurement agencies, which operated on their own and had not shown significant improvement. Ms. Barr also reported that the outlook for voluntary contractor compliance was dismal. Because the County could not collect information on minority participation in sub-contracts,[2] it surveyed a sample of prime contractors about their use of and contacts with minority subcontractors. Only three of twenty had accepted a quote from, or even contacted, any minority subcontractor. She concluded that vigorous attempts to produce results from the 1978 program had failed, and

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[2] The County's efforts to obtain information from white contractors about their use of minority and female subcontractors relied on voluntary completion by prime contractors of a subcontractor identification form in the contract documents. Most prime contractors did not even fill it out. Those that did invariably acknowledged using no black, and almost no Hispanic or female, subcontractors in the contracts being bid. (R. 3/12-13, 66-67).

that nothing short of enforceable race-conscious goals could succeed. Two years later, after extensive inquiry, the Board of County Commissioners agreed, adopting the predecessor to the law at issue. (Pl. Ex. 21).

Between 1978 and 1984 Hillsborough County was besieged with complaints of discrimination by both County agencies and prime contractors against blacks, Hispanics, and women. The commissioners received literally hundreds of constituent complaints; private and federal agencies also complained of discrimination. (R. 4, Bing, pp. 5-8, 12; Gilder, 13-16, 23-26). The discriminatory practices complained of included bid shopping (disclosing a minority subcontractor's quote to a white subcontractor and asking him to beat it); assisting white, but not black, subcontractors in obtaining bonding; refusal by suppliers to quote to minority businesses, or quoting higher prices to them; and use by prime contractors of minority "fronts" on federal projects. (R. 3/10-12, 32-38, 46-47; Deft. Ex. 18, 19, 32, 36). Hillsborough County had to re-advertise or accept higher bids on projects where low bidders had used minority "front" enterprises, and to establish procedures to police against the practice.

Many individual complaints of discrimination were referred by commissioners to the Equal Employment Office, which investigated as many as it could and found many that appeared well-grounded. (R. 3/33-34). This was as far as the agency could go. It possessed no enforcement powers, either through litigation or administrative proceedings, against a prime contractor who committed a particular act of discrimination.

Hillsborough County also conducted a detailed census of local businesses that were potential bidders for County contracts or sub-contracts or suppliers of goods and services, identifying each business by the race and sex of its controlling person or persons and by product or service supplied. (Deft. Ex. 28). The census, completed in 1984, showed that minority and female owned businesses constituted a substantial but unrepresented portion of the Hillsborough County business community as a whole. Out of 14,417 potential vendors, minority businesses constituted 1,378 (10%) and female-owned businesses 712 (5%). Minority representation among construction contractors was even higher, with minority contractors constituting 281 out of 2,378 (12%) and female contractors 112 (5%). By this time enough statistics had been complied about minority and female participation in the process and their representation in the business community. Total minority and female participation was less than 4% of total contract value. Most of this was received by Hispanic subcontractors, who were still under-represented by 4-1; black businesses did much worse, with 6% of the contractors getting less than 0.1% of the business, a 60-1 disparity. (Deft. Ex. 13, 31).

All of this information was presented to the County Commission, and discussed by it, on many occasions in 1983 and 1984 in public meetings and special workshops. The Commissioners included three white men, a white woman, and a black man (the first ever to hold county-wide office). The Commission had responded to the Equal Opportunity Office reports between 1981 and 1983 by requesting further study and increased efforts; on June

20, 1984, six years after the voluntary program was inaugurated, the County Commissioners voted 4-1 to adopt a minority business program containing enforceable goals for minority and female participation. Affirmative votes were cast by the three white male commissioners, each of whom placed himself on record before the vote as having been convinced by the evidence that race and sex discrimination had been, and was still being, practiced by prime contractors in Hillsborough County, and that an enforceable race-conscious program was needed to stop it. (Deft. Ex. 27).

Since 1984 the Commission has reconsidered and reenacted the law each year, making many substantive and procedural revisions. The current version, Resolution No. R88-0173, which is at issue here, appears in the Appendix to the Petition. Because petitioners raise issues about the substantive validity of the law, as well as about the need for race-conscious legislation, some discussion of its key features is required.

At the heart of the program is the County's directory of certified minority and female-owned businesses. The directory serves three purposes: 1) to screen businesses claiming to be owned and controlled by minorities and females to establish their *bona fides* and prevent the use of minority front enterprises; 2) to effectively identify to prime contractors those potential minority and female subcontractors who engage in the specialties they need; and 3) to serve as the basis for setting minority participation goals on all County contracts. Although the resolution contains a precatory county-wide goal of 25% for minority/female participation, actual participation goals

are set individually for each project, based on the availability of certified minority/female businesses engaged in the particular trades required for the work. Before any component of a contract can be included in the project goal it must be found to be subcontractable, and the directory must identify at least three certified minority/female subcontractors who provide the product or service required. No project goal may exceed 50%. Individual project goals have ranged between 50% and zero. The aggregate minority and female participation goals for projects advertised in fiscal year 1988-89 was 19.6%, closely approximating their representation in the pool of potential subcontractors in the 1983 census. (R. 4, Albert, pp. 7-13).

A bid is deemed "responsive" to minority participation specifications if the bidder shows either that he will meet his project goal or that, notwithstanding his failure to do so, he used good faith efforts to solicit and do business with minority/female subcontractors.[3] If the low bidder is found responsive, he is awarded the contract; if non-responsive, the contract is awarded to the next lowest responsive bidder, unless the lowest responsive bid exceeds the low bid by $100,000 or 15%. In fiscal year 1988-1989, through the date of hearing in the District Court, the County had evaluated bids on 33 projects. In 28 cases, including five where project goals had not been met, the low bidder was found responsive and was

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[3] The implementing regulation furnishing the guidelines for evaluating good-faith efforts is reproduced in the Appendix to this Brief.

awarded the contract without further proceedings. (R. 4, Albert, pp. 16-25).

A bidder found non-responsive has a right to appeal to the Protest Committee and to the Board of County Commissioners. Of the five low bids in 1988-89 initially found non-responsive, two were found responsive on appeal, one by the Protest Committee and one by the Board. In the three remaining cases, where the low bidders either did not appeal or appealed unsuccessfully, each low bidder received the contract despite a finding of non-responsiveness, each having under-bid responsive bidders by more than the amount of the bid credit. Thus, during the life of the current program, there has been no occasion when the lowest otherwise qualified bidder failed to receive the contract on account of it. Yet, despite its failure to divert any contract from a low bidder or cause any other injury identified by petitioners, the program had, in only four years, increased minority and female participation in County contracts from under 4% to 15.6%, almost equal to their representation in the local business community as indicated by the 1983 census.[4] (R. 4, Albert, pp. 25-29).

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[4] At page 23 the Petition states that minority participation had reached 19.6% by 1989, slightly higher than the percentage of minorities in the business community. The 19.6% figure, although taken from the opinion of the Court of Appeals, is inaccurate, as petitioners know. The correct figure is 15.6%. The 19.6% figure represents not minority/female participation in contracts awarded but minority/female goals set before the projects were advertised for bid. The foregoing is undisputed in the record. The figures for actual participation and initial

(Continued on following page)

On April 18, 1989 petitioners, who are general contractors doing business in Hillsborough County, commenced this action in the United States District Court for the Middle District of Florida, claiming that Resolution R.88-0173 denies them the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Petitioners did not allege that they, or any of them, had been adversely affected by the operation of the law in any identifiable way, by loss of contracts or otherwise. Petitioners' statements about discovery and the District Court's reception and review of evidence (pages 5-6) are inaccurate. The District Court set a hearing for May 2, 1989 on petitioners' motion for preliminary injunction, at which it scheduled briefs on the legal issues before taking evidence at a hearing on June 16, 1989. During this period no discovery was undertaken, except that the County made available to petitioners all of its files and records relating to the minority business program, on the understanding that it would have the burden of showing its justification. Respondents prepared to present evidence that would fit into a one-day hearing from their own resources; no question of discovery arose.

(Continued from previous page)

goals appear to have become transposed in the opinion of the Court of Appeals. In fact, the 19.6% figure was correctly referred to in the body of the Court of Appeals' opinion as a "working goal". 908 F.2d at 917.

The significance of the figures *per se* will be discussed in Argument. For present purposes we merely observe that petitioners' knowing reliance on an incorrectly stated statistic epitomizes their approach to the record as a whole.

On June 16, after one witness had testified, the Court announced that it had no more time for evidence because of other business and could not reconvene the hearing without substantial delay. This resulted in an agreement to take the testimony of the remaining witnesses before a court reporter and to submit transcripts and written argument to the District Court. (R. 3/69-70). This was done; the transcripts that appear in the record in deposition form (R. 4) are actually a substitute for the live testimony of the witnesses who were to have testified on June 16. From that point until after the District Court issued the preliminary injunction, neither side sought discovery.

On October 16, 1989 the District Court entered an order granting the motion for preliminary injunction, holding that plaintiffs had shown a likelihood of irreparable injury resulting from the operation of the program, despite their failure to claim any identifiable economic injury, because "continuation of the program will result in a perpetuation and extension of the deprivation of Plaintiff's constitutional rights." 723 F.Supp. 669, 678, and holding on the merits that the program violated plaintiffs' Fourteenth Amendment rights both because the County had failed to show a need for race-conscious measures and because the substantive provisions of the law were not narrowly tailored to meet the objective of correcting discrimination. Petitioners moved for summary final judgment on October 18 and December 28, 1989, asserting that the only evidence that could be presented in support of the program was that which had been before the County Commission at the time it was adopted in 1984, and that no discovery should be allowed. On February 12, 1990 the District Court agreed,

entering final judgment for petitioners based on the record previously compiled. The appeals taken by respondents from these Orders were consolidated by the Court of Appeals for argument and disposition.

Respondents filed motions in the District Court and in the Court of Appeals to stay the injunctions pending appeal, based in part on evidence showing that the white business community had reacted to the injunction by sharply reducing their business with minority contractors and ceasing altogether to do business with black contractors. Minority and female participation in bids submitted after October 16, 1989 went from 15.6% to 4.97%, equally divided between females and Hispanics; black participation dropped from 6.81% to zero.[5] The Court of Appeals stayed the injunctions on March 22, 1990.

On August 13, 1990 the Court of Appeals issued its opinion reversing the District Court's orders. It held that the evidence accumulated by Hillsborough County throughout six years of operating a voluntary race-neutral program established a *prima facie* case of discrimination in the local construction industry supporting its conclusion that race-conscious remedial measures were

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[5] This paralleled the experience of the City of Tampa, which had suspended its minority business program on March 17, 1989, with the following result (Deft. Ex. 39, 40):

	Before March 17	After March 17
Black	7.96%	0.17%
Hispanic	12.31%	4.35%
Female	0.66%	0.48%
Other	0.19%	0.21%
Total	21.13%	5.21%

required, and that the law was narrowly drawn to achieve its objective while minimizing any burdens imposed on petitioners or the white contracting community as a whole. The case was remanded to the District Court for further proceedings.

ARGUMENT

REASONS FOR DENIAL OF THE WRIT.

This case does not present the issues claimed by petitioners. Their attempt to portray Hillsborough County's law and its history as identical to the legislative record and product this Court considered in *City of Richmond v. J. A. Croson Company*, 488 U.S. ___, 102 L.Ed.2d 854 (1989), and to portray the Court of Appeals as indifferent or hostile to this Court's judgments, misstates both the record and the holding of the Court of Appeals. Petitioners' hidden major premise is that *Croson* outlawed all racially-conscious state and local affirmative action programs. To them there is no difference between the two hours Richmond spent considering discrimination and the six years Hillsborough County spent studying the subject; no delay could be long enough. No disparity in the distribution of public contract dollars, however gross or for how long sustained, could justify the Commission in concluding that there was discrimination. Petitioners view *Croson*'s explanation of the Richmond law's deficiencies as window-dressing; to them the decision is not a statement of principles applied to facts but a policy statement that discrimination is conclusively presumed to have ended.

Croson holds that the same standards of scrutiny apply to race-conscious legislation whether its classifications are called benign or invidious, remedial or vindictive. Strict scrutiny applies to contract preferences as well as to miscegenation laws. The Court of Appeals accepted and applied that principle. This case presents no issue worthy of the Court's consideration, since the record demonstrates that Hillsborough County's program is, on any material point of comparison, the polar opposite of the program considered in *Croson*. Respondents submit that the decision below is so plainly correct that the Court may consider summary affirmance under Supreme Court Rule 16.1 as an appropriate disposition of the Petition. We turn to the specific issues petitioners claim to present.

1. The Court of Appeals properly applied "strict scrutiny."

Petitioners accuse the Court of Appeals of pretending to apply strict scrutiny in reviewing Hillsborough County's minority business program but actually giving it only cursory review, and of searching through *Croson* for points on which it could distinguish a program essentially identical to Richmond's. If six years of operating a race-neutral program, taking a detailed census of the local business community, following contract dollars into sub-contracts (to the extent the trail was not blocked by prime contractors' refusal to furnish information), all documented in reports and studies and discussed in Commission meetings and workshops, are viewed as the functional equivalent of a single session's consideration of the problem of discrimination, then the Court of Appeals drew an untenable distinction between this case

and *Croson*. If a six year flood of discrimination complaints by federal agencies, constituents, and private organizations, many of which are supported by investigation, constitute an experience indistinguishable from the statement of a city councilman that after practicing law in Richmond he believed that there was discrimination in the local construction industry, then the Court of Appeals drew an untenable distinction. If these are material differences (and petitioners do not contend the contrary; they pretend they do not exist) the Court of Appeals followed *Croson* faithfully.

Petitioners' attack on Hillsborough County's statistical evidence is an attack on any inference drawn from statistics. It ignores *Croson*'s express holding that a *prima facie* case of discrimination may be established by a properly conducted statistical study that shows serious disparities between the percentage of public contract dollars reaching qualified minority businesses and the percentage of such enterprises in the business community. The City of Richmond compared prime contracts awarded to black businesses with black representation in the general population, a comparison the Court said was defective at both ends, since it did not take into account possible subcontracts going to black contractors and assumed, without evidence, that black contractors would be available in proportion to black representation in the general population. Hillsborough County identified the minority and female business community, and it followed the dollars into sub-contracts, despite the prime contractors' attempts to block the inquiry. Its comparison between public contract dollars flowing to minority and female businesses and the representation of minorities and

women in the entire business community showed continuing gross disparities, especially in the case of black contractors. That is precisely the nature and quality of statistical evidence this Court said in *Croson* would establish a *prima facie* case of discrimination sufficient to justify race-conscious remedial legislation.

It should be pointed out that the opinion of the Court of Appeals does not detail the entire body of statistical information compiled by the County between 1978 and 1984. Most of this is summarized in its statement that the County concluded that minorities "were significantly under-represented in such awards [on County contracts]" throughout that period. 908 F.2d at 914. The opinion refers to data for three weeks in July 1982, which had been broken out in the original compilation for reasons that do not appear. The three-year figures were actually worse than the 6.3% minority/female representation in July 1982. Overall minority and female participation was less than 4%, a 4-1 disparity for Hispanic and female contractors and a 60-1 disparity for black contractors. Although the disparities observed for Hispanics and women might arguably be less than gross, "outrageous" would more aptly describe the 60-1 disparity found between the representation of blacks in the contracting business and the amount of County work they actually got. Petitioners' carpings about the "capacity" of white versus black businesses are inconsequential against a backdrop of racial exclusion of this magnitude.

Petitioners' suggestion that the County's information is unreliable unless it incorporates some form of "capacity" evaluations of minority and non-minority firms at least implicitly conflicts with *Croson*'s reference to *Ohio*

Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983) as an example of a properly conducted statistical study. The data complied in *Ohio Contractors* incorporated no evaluations of relative capacity and did not reveal disparities as gross as those Hillsborough County found.

Furthermore, a "capacity" evaluation such as petitioners demand would be largely irrelevant. The question is not whether a white business could bid 100 jobs at once; it is whether minority businesses can bid for a given job. That minority businesses tend to be smaller than white businesses simply means that they reach capacity at a lower level, and therefore are more often unable to bid on new jobs while completing current contracts. A reduction in minority bidders translates, in Hillsborough County's program, into a reduction in the minority participation needed to satisfy project goals. This may in part account for the reduced minority/female participation in bids found responsive (15.6%) from the participation projected in the project goals (19.6%).

Petitioners suggest that the uncertainty and expense of having to rebut a *prima facie* case will deter the bringing of actions such as this, asking melodramatically how they could rebut a *prima facie* case based on statistical disparities. A *prima facie* case of discrimination is like a *prima facie* case of anything else – evidence of circumstances from which the decision-making authority may infer the existence of a fact not directly proved, if the circumstances are not adequately explained in a way that makes the inference untenable. In the context of Hillsborough County's legislative finding of past and present discrimination in the local construction industry, it means

that the Board of County Commissioners could rely on the evidence of continuing gross under-representation of minorities as showing discrimination, unless the evidence available to it suggested the existence of a reason other than discrimination that would convincingly account for the disparity. The issue tendered by petitioners is not presented by this record.

2. The Court of Appeals did not accept racial balancing as a proper legislative purpose.

Petitioners attempt to impeach the express declaration by the Hillsborough County Commission that it found discrimination in the local contracting industry, and its statement of purpose to correct that discrimination. They assert that the "real" reason was not because there was any discrimination but because the County decided simply to distribute the benefits of public contracts on a racial quota basis.

Petitioners falsely state at page 15 that "[t]he expressed goal of Hillsborough's MBE program was to ' . . . [establish a] program of equitable distribution [which] is based on the percentage of minorities constituting the minority population of Hillsborough County . . . '." The excerpted quotation is taken from a 1983 memorandum to the County Administrator from Robert Saunders, Equal Opportunity Director, reporting on the status of the voluntary program. Mr. Saunders recommended that a race-conscious program be established which would use population distribution as the basis for

comparison. This request, however, was rejected.[6] The program does not rely on population and never has. The 1984 goals were based on the representation of minorities and women in the pool of available contractors. Every component of the goal was within one percentage point of the representation of each group among contractors generally. Goals are set for each project, based not on population but on the demonstrated availability of minority/female subcontractors in the particular trades needed for the work. Petitioners' representation of a recommendation that the County rejected as a statement of its "expressed goal" is inconsistent with their obligations to the Court.

Petitioners claim support for their view of the purpose of the law in an extended footnote that collects every statement by anyone in County government that includes the word "equity" or "equitable". Respondents fail to perceive how the expression of a desire that governmental benefits be equitably distributed taints a finding of discrimination or suggests a purpose other than its elimination. An "equitable share" of public contract monies to black contractors is the share one would expect them to be getting without discrimination. The existence of long-continued discrimination prevents us from knowing precisely what that should be, but it is obviously

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[6] This issue was discussed at length at a Commission workshop in April 1984. The County Attorney advised the Board then and on other occasions that the program would have to use availability, not population, as a criterion. Availability was the express criterion of the resolution as enacted. (Pl. Ex. 21, Deft. Ex. 27).

much greater than 0.1% for a group of contractors constituting 6% of the total. Respondents see no equity in this. Nor is it evidence of a hidden agenda to impose racial quotas that the County uses minority representation among contractors as a lodestar in estimating what they should have gotten without discrimination.

The Court of Appeals discussed the County's purposes in adopting the program, finding "that the County MBE law was not the result of some vague government desire to right past wrongs. The law resulted from prolonged studies of the local construction industry that indicated a continuing pattern of discrimination." 908 F.2d 908, 915. Nothing in the record presents any legitimate issue regarding its purpose.

3. *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L.Ed.2d 733 (1989) has no bearing on a local government's demonstration of need for race-conscious measures.

Petitioners claim that *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L.Ed.2d 733 (1989) requires that a state or local government seeking to support a race-conscious public contract program identify with particularity the discriminatory practices resulting in the under-representation of minorities and women it finds to exist. Hillsborough County, they say, has never identified "even *one* discriminatory practice at which this program is aimed". (Petition at 17, emphasis in original). Petitioners' argument both misreads *Croson* and *Wards Cove* and misstates the record. Respondents identified many discriminatory practices, several of which were referred to by the Court of Appeals, that the County

found to exist and against which the program was aimed. These included bid shopping, discriminatory pricing by suppliers, the use of minority front enterprises by prime contractors, and others.

Moreover, petitioners' attempt to bring *Wards Cove* to bear in this case is defeated by its own internal illogic and by its failure to correctly represent the holding of either *Wards Cove* or *Croson*. *Wards Cove* was a disparate-impact employment discrimination case brought under Title VII of the 1964 Civil Rights Act. Plaintiff contended that the employer, a salmon cannery, maintained racially distinct classes of employees – cannery workers and non-cannery workers. Most cannery workers were employed through a Philippine labor union, which supplied mostly Philippines and other non-whites. Non-cannery employees were predominantly white. Plaintiff contended that several employment practices, not discriminatory in themselves, caused the maintenance and perpetuation of distinct racial lines between the two groups.[7] This Court held that plaintiff could not make out a *prima facie* statistical case of employment discrimination by comparing the racial composition of cannery workers to that of non-cannery workers, since the class of cannery workers did not fairly represent the pool of available applicants that must be the basis for comparison. The holding of *Wards Cove* on this point parallels *Croson*'s holding about statistical studies. The error in both cases was the failure to

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[7] The practices included nepotism, a re-hire preference, a lack of objective hiring criteria, separate hiring channels (i.e., the labor union for cannery employees), not promoting from within, and not posting notices for non-cannery jobs at the cannery.

compare minority representation in the "favored" group with minority representation in the group from which one could expect those in the "favored" class to be selected, i.e., the pool of available applicants. Richmond assumed that because minorities constituted 50% of the city's population, minority representation in the pool of available applicants for public contract work would be the same. The Hillsborough County program does not suffer from this or any other defect in its statistical underpinnings.

This Court also held in *Wards Cove* that if, on remand, plaintiffs showed a statistical disparity between the number of non-whites in the at-issue positions and their representation in the pool of available applicants, they must also show a causal link between the facially non-discriminatory practices they challenged and the under-representation of non-whites. It is from this holding that petitioners would draw a rule that a state or local government seeking to justify its use of race-conscious remedies must show, in addition to a pervasive pattern of discrimination, specific discriminatory practices engaged in by members of the white business community.

Wards Cove dealt not with identification but with causation. The burden has always been on one who claims that a facially neutral employment practice is discriminatory in its effects to present evidence from which it can be concluded that the practice has "a significantly disparate impact on employment opportunities for whites and non-whites". 490 U.S. at ___, 104 L.Ed.2d at 751.[8] We

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[8] This is usually accomplished by showing that the practice screens out minorities (or females) by directly or indirectly

(Continued on following page)

deal here not with facially neutral employment practices but with a long-standing pattern of systematic exclusion of minority businesses. Are petitioners suggesting that we must present evidence that shopping minority contractors' bids to white contractors reduces opportunities for minority contractors to participate in public contracts?

It is petitioners who make incorrect comparisons, by attempting to derive principles from a disparate-impact employment case to apply to the analysis of a legislative finding of county-wide discrimination in the construction industry. To the extent that analogies may properly be drawn from employment cases, the more apt comparison is to a disparate-treatment case, where plaintiff shows that the employer has never hired a black, although blacks are a substantial fraction of the pool of potential employees. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Hillsborough County found that its minority business community had encountered precisely that situation in the competition for sub-contracts on hundreds of County projects throughout the life of the 1978 program. Disparate-impact analysis might have an analogue where minority businesses were under-represented in a limited group of trades, but it has nothing to do with their exclusion from the entire market. Six years of observing the systematic under-representation of Hispanic and female contractors,

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(Continued from previous page)

requiring a characteristic possessed disproportionately by non-minorities (or men). See *Dothard v. Rollinson*, 433 U.S. 321 (1977).

and the systematic exclusion of black contractors, was enough to justify the County's conclusion that discrimination was at work.

4. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. ___, 111 L.Ed.2d 445 (1990) has no bearing on the evaluation of a state or local race-conscious program, nor did the Court of Appeals rely on it in finding that Hillsborough County had made an adequate showing of need.

Petitioners repeat their assertion in Point II that the Hillsborough County minority business program was enacted not to remedy discrimination but to accomplish some broader societal goal. They claim that the Court of Appeals implicitly held that a state or local race-conscious public contract program may be adopted for purposes other than remedying discrimination, stating that "only if . . . a purpose other than remediation is permissible does the Court of Appeals' decision make sense". (Petition at 19).[9] The Court of Appeals is supposed to have got this idea from *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. ___, 111 L.Ed.2d 445 (1990), which upheld minority preferences applied by the FCC in evaluating applicants for broadcast licenses. *Metro Broadcasting* is not cited by the Court of Appeals, nor is

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[9] As we showed in Point I, the Court of Appeals' decision makes sense on its own terms, i.e., that Hillsborough County conducted sufficient inquiry before adopting a race-conscious program to properly satisfy itself that discrimination was indeed being practiced.

there anything in its opinion that even hints of a belief that any purpose but remediation can or should be used to justify a race-conscious public contracts program.

Petitioners cite *Harrison & Burrowes v. Cuomo*, ___ F.Supp. ___ (N.D. N.Y. 1990) and *H. K. Porter Co. v. Metropolitan Dade County*, unreported (S.D. Fla. 1990)[10] as examples of confusion generated in the lower courts by *Metro Broadcasting* about the proper standard of review. The only confusion is in the Petition. *Harrison & Burrowes* considered two New York minority business programs that applied respectively to state and federally-funded contracts. The Court found that the law governing state projects did not have an adequate legislative predicate under *Croson* and issued a preliminary injunction against its application. It denied a preliminary injunction as to the federal program, citing *Metro Broadcasting* as a basis for the distinction in the standard of review to be applied. *H. K. Porter* considered a federal program. In rejecting plaintiff's claim that *Croson* standards applied, the Court cited *Metro Broadcasting* (and *Croson* itself) to show that a less restrictive standard applied to federal programs.

We cannot understand why *Metro Broadcasting* might confuse anyone about the standard of review applicable to a state or local law. The *Croson* plurality held that Congress may adopt race-conscious programs in circumstances where states and localities may not. The lower courts are aware that different standards of review apply

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[10] Because the *H. K. Porter* opinion has not been published, it is reproduced in the Appendix.

to state and federal laws.[11] Federal programs may be more easily justified than state and local programs; how much more will be established in cases dealing with federal, not state, programs. *Metro Broadcasting* has no implications for the outcome of this case, and petitioners' suggestion that the Court of Appeals thought it did is specious. The issue framed by petitioners is not presented by this record.

5. Hillsborough County considered and implemented race-neutral measures before resorting to a race-conscious program.

Petitioners claim that the Court of Appeals falsified its opinion in stating that Hillsborough County had tried race-neutral measures and found them ineffective,[12] that the Court decided the case as it did because it believes that there should be no need to consider race-neutral remedies. We have already discussed, in the Statement of the Case, petitioners' abuse of the Record in asserting that the 1978 program was never funded or implemented. The program was made a part of the record in the District Court, and there was substantial testimony about its operations. Petitioners have attempted to convert staff complaints that the program was not succeeding into

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[11] The Court of Appeals was aware of it in this case. One issue respondents raised was that the injunction, even if valid as to locally funded contracts, should be modified to permit the County to fulfill its obligations under federal programs. The Court of Appeals noted that issue but did not reach it.

[12] "This is simply not so and reflects the Court of Appeals' cavalier approach to judicial review of race-conscious programs." (Petition at 21).

proof that there was no program. The record does not present the issue they tender.

6. This record presents no issue regarding the continuing need for a race-conscious program in Hillsborough County, when such issue was not referred to by the Court of Appeals or presented to it by the parties.

Petitioners finally assert that, even if the program was justified in 1984, it has achieved its purpose and the Court of Appeals erred in allowing it to continue, since minority participation in 1988-1989 was 19.6%, greater than the percentage of minority contractors. This argument is grounded on falsification.

As shown in the Statement of the Case, the 19.6% figure relied on by petitioners is inaccurate. Minority and female participation in contracts awarded in fiscal year 1988-1989 was 15.6%; the aggregate of goals set on 1988-1989 projects before advertisement was 19.6%. Counsel for petitioners heard the pertinent testimony; there was no dispute about the figures in the briefs or argument below. Petitioners have relied on an inadvertent misstatement by the Court of Appeals in order to make a more melodramatic argument than the true data would support.

Whether the program is still needed is a question that has never been presented to the courts below. The focus of judicial attention has always been its initial justification. We hope for a time when this program can be dismantled, but the record clearly shows that this is not the time, even were the issue presented. Besides using

incorrect statistics for minority/female participation, petitioners ignore what happened when the constraints of the program ceased. Hillsborough County experienced the same immediate and precipitous drop in minority participation after the entry of the injunction on October 16, 1989 that the City of Tampa experienced after it suspended its program on March 17, 1989. As with Tampa, bids submitted to Hillsborough County after the injunction totally excluded black contractors, as they had done before 1984, and significantly under-represented other minority contractors.[13] For petitioners to assert that the program is no longer needed, when their own behavior after the injunction demonstrates its continuing necessity, is farcical. The record does not present this issue.

CONCLUSION

The record does not support petitioners' claim that the Court of Appeals is unwilling or unable to apply the standards of *Croson* impartially. Respondents are confident that, were this Court to grant the petition in the belief that the case actually raises a question about the proper application of *Croson*, it would affirm after full

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[13] The Court of Appeals referred in a footnote to Hillsborough County's post-injunction experience, commenting that it "would clearly point to discrimination". 908 F.2d at 915, n. 10. The note states that the record contains no evidence about it. In fact, an affidavit containing the information was attached to the Motion for Stay of Injunction filed in the District Court and became a part of the Record on Appeal from the permanent injunction. It was also attached to the Motion to Stay Injunction filed with the Court of Appeals.

consideration. Respondents believe that the correctness of the decision of the Court of Appeals is so manifest that they feel obliged to note that, under Supreme Court Rule 16.1, this Court's options include summary disposition on the merits.

The issues raised by affirmative action programs have deeply divided this country. Questions of what kind of legislative record will support a race-conscious remedial measure, and what kinds of programs are sufficiently tailored to their purpose, will occupy the courts for years; the business of divining what this Court "really meant" in *Croson* threatens to become a cottage industry. Respondents believe that some of the more unhealthy speculation would end, should the Court summarily affirm the judgment of the Court of Appeals. *Croson* provides a vivid example of a minority business program that was enacted without sufficient consideration, and operated in too draconian a manner, to meet Fourteenth Amendment standards. This case presents an equally vivid example of a program whose legislative foundation is comprehensive and reliable, and whose provisions are well tailored to its goal. Should the Court officially acknowledge that, the lower courts could turn to their task in confidence that the stream in which they row has banks on either side. Respondents respectfully request that the Petition for a Writ of Certiorari be denied, or in the alternative that the

Court enter its order summarily affirming the judgment below.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2766-CIV-DAVIS

H.K. PORTER CO., INC.,

Plaintiff,

v.

METROPOLITAN DADE COUNTY, et al.,

Defendants.

_____/

ORDER
ON REMAND
(Filed
July 16, 1990)

THIS MATTER is before the Court on Remand from the United States Court of appeals for the Eleventh Circuit.

FACTS

This dispute arises out of the award of a federal construction contract ("contract Y-621") for the electrified third rail of Miami's metropolitan transit system.[1] Defendant Metropolitan Dade County ("MDC") awarded the contract to the second lowest bidder, Transit Products, Inc., ("Transit") pursuant to an affirmative action plan.

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[1] The facts of this cause are set on [sic] in detail in *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 650 F.2d 778 (5th Cir. Unit B 1981). The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Plaintiff, the low bidder, contends that the affirmative action plan is unconstitutional.

On May 8, 1986, the Court Granted Defendants' Motion for Summary Judgment and Denied Plaintiff's Motion for Summary Judgment. The Court found that MDC's bidding procedure for contract Y-621 was not unconstitutional and that MDC did not act arbitrarily or capriciously in denying the Metrorail contract to Plaintiff. In so ruling, the Court noted that "[i]n light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress had the power to remedy the effects of past discrimination. DADE COUNTY'S modest 5% minority business enterprise goal – not quota – for the Metrorail contract was a valid implementation of Congressional policy."

On Appeal, the Eleventh Circuit affirmed this Court's summary judgment award to MDC, holding that (1) the Urban Mass Transit Administration ("UMTA") had the authority, pursuant to a clear and strong Congressional mandate, to promulgate the Minority Business Enterprises ("MBE") program relative to contract Y-621; (2) MDC's use of a 5% MBE goal in contract Y-621 was not unconstitutional; and (3) MDC did not act arbitrarily and capriciously in denying the award of the contract to Plaintiff.[2]

On March 9, 1989, the United States Supreme Court granted Plaintiff's petition for writ of certiorari to the

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[2] *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *vacated*, 109 S. Ct. 1333 (1989).

United States Court of Appeals for the Eleventh Circuit, vacated the Eleventh Circuit's judgment and remanded this cause "to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *City of Richmond v. J.A. Croson Company*, 488 U.S. ___, 109 S. Ct. 706, ___, L.Ed.2d ___ (1989)."[3] On April 13, 1989, the Eleventh Circuit remanded the above-styled cause to this Court "for such proceedings as the District Court deems necessary in view of the Order of the Supreme Court of the United States of March 9, 1989."

In *Richmond*, the United States Supreme Court "confront[ed] once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society."[4] The Richmond City Council adopted a minority set-aside program which "required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs)."[5] In holding that the city of Richmond did not demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race, the Court averred that:

> [w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination,

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[3] 109 S. Ct. 1333.

[4] 109 S. Ct. 706, 712 (1989).

[5] *Id.* at 712-13.

> they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."[6]

The Court also found that the Richmond set-aside program was not narrowly tailored to remedy the effects of prior discrimination.[7]

On remand, Plaintiff moves this Court to reconsider its May 8, 1986, Order Granting Defendants' Motion for Final Summary Judgment in light of *Richmond*. Plaintiff's reliance on *Richmond* is misplaced, however, because that case does not address the situation where Congress mandates state and local public bodies to implement minority business goals as a condition to receiving federal financial assistance for the construction of highway and mass transportation projects. This Court and the Eleventh Circuit found *Fullilove v. Klutznick*,[8] controlling. In *Fullilove*, the United States Supreme Court held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.[9]

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[6] *Id.* at 727.

[7] *Id.* at 728-29.

[8] 448 U.S. 448 (1980).

[9] *Id.* The federally funded project and MBE provision in *Fullilove* are similar to those at issue in the instant case.

Recognizing the significant differences between the set-aside program upheld in *Fullilove* and that at issue in *Richmond*, the *Richmond* Court specifically noted that "[in *Fullilove*], Congress was exercising its power under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patters of discrimination."[10]

On Appeal, the Eleventh circuit indicated that:

> [t]he record does not suggest that MDC conducted such detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in contract Y-621. We must concede that we are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621.[11]

Consequently, on remand, the Court conducted a hearing on September 11, 1989, to allow MDC to introduce evidence on its determination of the 5% MBE goal for contract Y-621 and to withdraw certain admissions.

In considering the Eleventh Circuit's remand of this action, this Court is particularly mindful of the United

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[10] *Richmond*, 109 S. Ct. at 726-27. As noted in Part II of Justice O'Connor's *Richmond* opinion, in which Chief Justice Rehnquist and Justice White joined, the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here." *Id.* at 720.

[11] *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324, 332 (11th Cir. 1987), *vacated*, 109 S. Ct. 1333 (1989).

States Supreme Court's recent affirmation of the principles annunciated in *Fullilove*. In *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 58 U.S.L.W. 5053 (U.S. June 27, 1990), the Court addressed "whether certain minority preference policies of the Federal Communications Commission violate the equal protection component of the Fifth Amendment."[12] In finding the commission's minority ownership policies constitutional, the Court averred the following:

> We hold that benign race – conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.
>
> Our decision last Term in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress. As JUSTICE KENNEDY noted, the question of congressional action was not before the Court, *id.*, at 518 (opinion concurring in part and concurring in judgment), and so Croson cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and

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[12] *Metro Broadcasting*, 58 U.S.L.W. at 5054.

ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.[13]

Based on the foregoing and after reviewing the record and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Reconsideration is DENIED and this Court's prior judgment is REAFFIRMED.

DONE AND ORDERED IN Chambers at Miami, Florida, this 13th day of July, 1990.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

copies furnished to
counsel of record

tdf

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[13] *Id.* at 5057.

Administrative Order 88-3 (Pl. Ex. 2)

11.2 The County shall consider the following criteria in determining good faith efforts:

(a) Attendance at the pre-bid conference, if held;

(b) Whether and when the contractor provided written notice, by mail or hand delivery to all certified MBE/DMBE/DWBE that perform the type of work to be subcontracted and advising the MBE/DMBE/DWBE:

(1) of the specific work the contractor intends to subcontract;

(2) that their interest in the contract is being solicited; and,

(3) how to obtain information for the review and inspection of contract plans and specifications;

(c) Whether the contractor selected economically feasible portions of work to be performed by MBE/DMBE/DWBE, including, where appropriate, breaking contracts of combining elements of work into economically feasible units. (The ability of the contractor to perform the work with its own work force will not in itself excuse a contractor from making positive efforts to meet contract goals);

(d) Whether the contractor submitted all quotations received from MBE/DMBE/DWBEs, and for those quotations not accepted, an explanation of why the MBE/DMBE/DWBE will not be used during the course of the contract (Receipt of a lower quotation from a non-MBE/DMBE/DWBE will not in itself excuse a contractor's failure to meet contract goals);

(e) Whether the contractor provided interested MBE/DMBE/DWBE assistance in reviewing the contract plans and specifications;

(f) Whether the contractor assisted interested MBE/DMBE/DWBE firms in obtaining required bonding, lines of credit or insurance;

(g) Whether the contractor's efforts were merely pro forma and, given all relevant circumstances, could not reasonably be expected to provide sufficient MBE/DMBE/DWBE participation to meet the goals;

(h) Whether the contractor has utilized MBE/DMBE/DWBE subcontractors on other County contracts within the past six months;

This list is not intended to be exclusive or exhaustive and the County will look not only at the different kinds of efforts that the contractor has made, but also the quality, quantity and intensity of those efforts.